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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1121

ESTES EXPRESS LINES, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

JURISDICTIONAL STATEMENT

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INDEX

	Page
JURISDICTIONAL STATEMENT	1
OPINION BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT	3
THE QUESTIONS ARE SUBSTANTIAL	5
(a) The Need For Certainty	5
(b) History of Section 210a(a)	6
(c) The Questions Presented Require For Their Resolution Plenary Consideration With Briefs On The Merits And Oral Argument	9
(1) There Is A Conflict On The Questions Presented Between The 4th And 9th Circuits	9
(2) The District Court's Decision Reverses Settled Administrative Construction	10
(3) Dispositive Action On The Questions Presented Will Tend To Lessen Further Litigation Before The Interstate Commerce Commission And The Federal Courts	11
CONCLUSION	15
APPENDIX A (Opinion of Lower Court)	17
APPENDIX B (Order of Commission)	24
APPENDIX C (Statutes)	28
APPENDIX D (Second Order of Commission)	41
APPENDIX E (Opinion of 9th Circuit Court)	42
APPENDIX F (Commission Policy Clarification)	50
APPENDIX G (Appellants' Letter to Commission)	52

TABLE OF CITATIONS

Cases: Page

Acme Cartage Co. et al. v. *United States*, Civil Action No. 3677, U.S. District Court, Western District of Washington, Southern Division, decided October 4, 1968 ..... 9, 10, 42

Alcoa S.S. Co. v. *U.S.*, 338 U.S. 421 (1949) 14

American Trucking Associations, Inc. v. *United States*, 364 U.S. 1 (1960) 2

Burlington Truck Lines v. *United States*, 371 U.S. 156 (1962) 8

Columbia Broadcasting System v. *United States*, 316 U.S. 407 (1942) 8

Commissioner v. *South Texas Lumber Company*, 333 U.S. 496 (1948) 10

Ex Parte No. 67, 98 M.C.C. 483 7

Frozen Food Express, Inc. v. *United States*, 351 U.S. 40 (1956) 2

Ludecke v. *Watkins*, 335 U.S. 160 (1948) 14

Mississippi Valley Barge Company v. *United States*, 252 F. Supp. 152 (E.D. Mo. 1966) 8

Pan-Atlantic S.S. Corp. v. *Atlantic Coast Line R. Co.*, 353 U.S. 436 (1957) 12

United States v. *Drum*, 368 U.S. 370 (1962) 2

Statutes:

Administrative Procedure Act,
Section 9(b) 12

Code of Federal Regulations, 49 C.F.R.
Section 2.1 12
Section 1131 ..... *passim*
Section 1131.2(c) ..... *passim*

Interstate Commerce Act, 49 U.S.C.
Section 307 2
Section 310a(a) ..... *passim*

IN THE

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ESTES EXPRESS LINES, ET AL.,
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v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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JURISDICTIONAL STATEMENT

Appellants, Estes Express Lines, Great Coastal Express, Inc., Hemingway Transport, Inc., Long's Express, Inc., Service Transport, Inc., and Wilson Trucking Corp., appeal from the judgment of the United States District Court for the Eastern District of Virginia dismissing their complaint to set aside an order of the Interstate Commerce Commission and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court has not been reported as of the time of the filing of this Statement. A copy of the opinion is set forth as Appendix A. A copy of the Interstate Commerce Commission's order in Docket No. MC-66562 (Sub-No. 2262TA), *Railway Express Agency Incorporated, New York, New York,* dated December 7, 1967, and served December 14, 1967, is attached as Appendix B.

JURISDICTION

This suit was brought under 28 U.S.C. § 1336, 1398, 2321-2325, to set aside the order of the Interstate Commerce Commission. (Appendix B) The judgment of the District Court was entered on November 13, 1968, and notice of appeal was filed in that court on January 9, 1969.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§ 1253 and 2101(b). And the following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal: *United States* v. *Drum*, 368 U.S. 370 (1962); *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1 (1960); *Frozen Food Express, Inc.* v. *United States*, 351 U.S. 40 (1956).

STATUTES INVOLVED

The statutes involved are the Interstate Commerce Act; Section 210a(a), 49 U.S.C. § 310a(a), and Section 207, 49 U.S.C. § 307; and Temporary Authority Regulations, 49 C.F.R. § 1131, all of which are set forth in Appendix C.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission is bound by its own regulations governing the issuance of

temporary authority franchises to motor carriers under Section 210a(a) of the Interstate Commerce Act;

2. Whether Railway Express Agency, Incorporated (Railway Express), when applying for temporary authority is required to meet the statutory provisions of Section 210a(a) of the Interstate Commerce Act and the Commission's rules and regulations governing the disposition of applications for such authority;

3. Whether the District Court was correct in affirming the order and holding of the Commission granting temporary authority to Railway Express under Section 210a(a).

STATEMENT

This controversy began with an application filed on October 30, 1967, by Railway Express under Section 210a(a) of the Interstate Commerce Act for 150-day temporary authority to operate as a common carrier by motor vehicle, over regular routes, transporting general commodities, moving in express service, between Washington, D. C., and Richmond, Va., serving named intermediate and off-route points. Notice of the filing of the application was published in the *Federal Register* on November 7, 1967, and appellants filed protests.

By order of the Commission, by its Temporary Authorities Board (Appendix B), the application was granted on the ground that Railway Express had established an immediate and urgent need, as required by law, for the temporary service proposed. On December 27, 1967, appellants filed a petition with the Commission seeking reconsideration of the order of the Temporary Authorities Board. Railway Express replied to this petition contending generally that there was an immediate and urgent need for its proposed service because of the discontinuance of certain train service between Washington, D. C., and Richmond, Va., and that the Board's order was in accordance with the evidence and applicable law.

By an order dated January 30, 1968, and served February 1, 1968 (Appendix D), the Commission's Division 1, acting as an Appellate Division, denied appellants' petition for reconsideration "for the reason that no showing has been made which would warrant a conclusion different from that reflected by the said order of December 7, 1967." Under the Commission's General Rules of Practice, appellants had exhausted their administrative remedies.

On May 17, 1968, appellants brought suit in the United States District Court for the Eastern District of Virginia to set aside the Commission's order granting the temporary authority, charging that the supporting shipper statements did not meet the requirements set forth in the Commission's rules and regulations in 49 C.F.R. § 1131.2 (c),[1] governing disposition of temporary authority applications under Section 210a(a). Defendants below in effect conceded that the Railway Express application did not fully comply with the Commission's rules. They claimed that there was "substantial compliance" and such was enough.[2]

In dismissing the complaint, the District Court discussed Items 8 and 9, only two of the 11 informational requirements set forth in the Commission's rules and regulations dealing with the content of supporting shipper statements. The court held that the information prescribed by Items 8 and 9, which require the supporting companies to indicate, "whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts," and "names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal," had been reason-

[1] The 11 informational requirements are set forth at pages 7-8 and in Appendix C.

[2] Government's Brief to the District Court, pp. 6-10; Railway Express's Brief, pp. 18-19.

ably answered.[3] It based its conclusion, in part, upon its understanding that appellants had not alleged that they hold themselves out to the public as providing the same coordinated, nationwide services for express as Railway Express (App. A, pp. 6-7). Accordingly, the court held that the Commission's grant of temporary authority to Railway Express was not arbitrary or capricious and dismissed the complaint.

THE QUESTIONS ARE SUBSTANTIAL

(a) The Need For Certainty

This case presents to the Court a question requiring definitive interpretation and application of the language of an important section of the Interstate Commerce Act and the Commission's rules and regulations dealing with such section. The precise question presented is whether the Commission is bound by its own regulations governing the issuance of temporary authority franchises to motor carriers under Section 210a(a) of the Interstate Commerce Act. There are in excess of 5,000 temporary authority applications filed each year with the Commission. This Court's final resolution of the questions presented will determine whether under the regulations involved the Commission may at its whim treat differently Railway Express from other motor carriers. While the gravity of

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[3] There were 11 "boiler plate" statements filed by supporting shippers and receivers and they all responded to the information required of Items 8 and 9 as follows:

> 8. I am currently obtaining the service I need from REA Express, and, accordingly, have had no occasion to seek express service from anyone else. Within my knowledge, however, no service other than that of R E A possesses all of the special characteristics required for adequate handling of my express shipments. If R E A service became unavailable, I would have an immediate and urgent need which no other carrier could meet.
>
> 9. Name and address of carrier filing application: Railway Express Agency, Incorporated, 219 East 42nd Street, New York, N. Y.

the situation generally may be sensed from the number of temporary authority applications processed annually by the Commission, the importance of the issues presented on this appeal can best be realized through a review of the history of the Commission's administration of Section 210a(a).

(b) History Of Section 210a(a)

Section 210a(a) provides that, "To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearing or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle as the case may be." The section povides further that such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of 180 days. Section 210a(a) was enacted by Congress in June, 1938 (52 Stat. 1238).

In the years following Congress's grant of power to the Commission to authorize temporary motor carrier operations, there was much confusion relating to temporary authority applications because of the absence of standards as to what would be acceptable to the Commission as establishing an immediate and urgent need for a temporary franchise. As a result, slipshod and even fraudulent practices developed in the processing of temporary authority applications. Cognizant of the many problems resulting from the absence of proper rules and regulations, the Commission, by notice and order entered November 5, 1964, had published in the *Federal Register* of November 18, 1964, proposed rules governing disposition of "temporary authority applications under Section 210a(a) of the Interstate Commerce Act"; and, thereafter, upon receipt of representations from a number of individual carriers, including Railway Express, carrier associations, and

others, adopted the proposed rules on April 7, 1965, and they became effective on July 1, 1965.

Issued in Ex Parte No. 67, 98 M.C.C. 183, and published at 49 C.F.R. 1131, the rules specify with particularity the content of statements filed in support of temporary authority applications. The paragraph immediately preceding the specification of various areas of information to be submitted states, *inter alia*, "each application for temporary authority *must* be accompanied by supporting statements * * *", and; "any such supporting statement must contain at least the following information" (emphasis added):

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested.)

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known. (98 M.C.C. at 490-492; 49 C.F.R. 1131.2(c))

Inasmuch as the Commission elected to establish standards through a rule-making proceeding in the area of temporary authorities, motor carriers subject to the Commission's regulations understood these regulations to have the force and effect of law and that they, as well as the Commission, were bound by their terms.[4] See, *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942); *Service* v. *Dulles*, 354 U.S. 363 (1957); *Mississippi Valley Barge Company* v. *United States*, 252 F. Supp. 162 (E.D.Mo., 1966).

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[4] In this connection, the observation of Mr. Justice White in *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167 (1962) bears noting:

> Expert discretion is the lifeblood of the administrative process, but "unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion." New York v. United States, 342 U.S. 882, 884, 96 L.ed 662, 663, 72 S. Ct. 152 (dissenting opinion). "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body." Federal Communications Com. v. RCA Communications, Inc., 346 U.S. 86, 90, 97 L.ed 1470, 1475, 73 S. Ct. 998.

(c) The Questions Presented Require For Their Resolution Plenary Consideration With Briefs On The Merits And Oral Argument

The fundamental problem presented here is, as earlier stated, the significance of rules and regulations promulgated by the Commission in connection with its statutory authority in Section 210a(a) to grant temporary authority to motor carriers. This case has a number of aspects which, based upon prior decisions of this Court, justify the Court's taking jurisdiction. Those aspects are indicated below:

(1) There Is Conflict On The Questions Presented Between The 4th and 9th Circuits.

Customarily this Court has entertained cases from a lower federal court where it has been shown that the decision sought to be reviewed is in conflict with prior decisions of one or more other judicial circuits. Appellants contend that an analysis of the District Court's decision is in conflict or at least substantially inconsistent in theory with the decision of the United States District Court for the Western District of Washington, Southern Division, in *Acme Cartage Co., et al.* v. *United States*, Civil Action No. 3677, decided October 4, 1968, a copy of which is appended as Appendix E. The district court in Washington held that the rules promulgated by the Commission governing the content of statements filed in support of temporary authority applications are substantive rules and compliance with such rules is necessary in order to permit the Commission to exercise its discretion under Section 210a(a) and to reach the statutory finding whether an "immediate and urgent" need for the service proposed exists.

Until the decision by the District Court here, motor carriers seeking temporary authority under Section 210a (a) understood that in order to be successful their supporting shipper statements had to meet the Commission's

rules and regulations as set forth in 49 C.F.R. 1131.2(c); and this understanding conformed to the *Acme Cartage* decision. The Virginia District Court's decision is a radical departure from the industry's understanding of the scope and significance of the Commission's rules and regulations governing temporary authority and the decision of the Washington District Court. The Virginia Court's holding suggests that substantial compliance or partial compliance (to a degree determined not by the Commission but by the applicant) is enough to justify the Commission's grant of temporary authority. This is directly contrary to the District Court's decision in *Acme Cartage*.

(2) *The District Court's Decision Reverses Settled Administrative Construction*

Long-standing administrative construction by an agency charged with the enforcement of the statute questioned has been given great weight by the federal courts; and where a lower court has disagreed with administrative interpretation, this Court has frequently assumed jurisdiction for the purpose of returning certainty to the law. *Commissioner* v. *South Texas Lumber Company*, 333 U.S. 496, 499-500 (1948).

The Commission has recognized the essential purposes of the rules here and the vital importance of compliance with the very rule provisions involved in this case through past public pronouncements. For example, in the Commission's 79th Annual Report, it stated at page 39:

> On April 7, 1965, the Commission adopted new rules for the filing, processing, and determination of applications for motor carrier temporary authority, under section 210a(a) of the Interstate Commerce Act. The rules *require* more complete information to be furnished by carriers and shippers, and set forth *minimum standards* of proof necessary for a grant of temporary authority. (Emphasis added.)

That the requirements of the supporting shipper statements are more than guidelines is buttressed by a recent Commission public notice (Appendix F) wherein it made clear that the requirements of 49 C.F.R. 1131.2(c) are meant to be met.

(3) *Dispositive Action On The Questions Presented Will Tend To Lesson Further Litigation Before The Interstate Commerce Commission And The Federal Courts*

Railway Express claims to be the only nationwide[5] motor carrier of general commodities moving in express service, a position in transportation accepted by the District Court. This means that in any application for temporary authority by Railway Express, all it need do, under the District Court's decision, is have supporting shippers say they need nationwide express service and it is entitled to a grant of the authority. And since the District Court has held, in effect, that the supporting shipper statements do not have to meet all the requirements of 49 C.F.R. 1131.2(c), there is no way that carriers opposing the application can effectively test whether in fact there is an immediate and urgent need for Railway Express's proposed service. Thus, appellants hold authority to provide the service proposed between Washington, D. C., and Richmond, Va. But because the shippers claim that only Railway Express can provide the service and the District Court has said that they need not say any more, appellants are unable effectively to rebut the supporting shippers' claims of a need for the service.

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[5] Railway Express does not hold motor carrier authority to transport general commodities, moving in express service, throughout the United States. In fact, its motor carrier authority is generally concentrated east of the Mississippi River. It offers service to points beyond its motor carrier lines in connection with certain railroads, airlines, and motor carriers, including two appellants. Appellants and most other motor carriers also offer nationwide service by virtue of joint-line arrangements with other carriers.

Furthermore, in any instance where Railway Express seeks temporary authority, there is no way, in view of the District Court's decision, for general freight carriers to determine whether in fact there is a need for express service or whether general freight carriers can provide the service. Accordingly, the District Court's decision means that Railway Express is no longer subject to the requirements of Section 210a(a) and may be granted temporary authority on the basis of a bald pronouncement by a shipper that it immediately requires the service of Railway Express and without any obligation on the part of the shipper to first investigate what service is available.

In addition, a grant of temporary authority was held by the Court in *Pan-Atlantic S.S. Corp.* v. *Atlantic Coast Line R. Co.*, 353 U.S. 436 (1957), to be a license within the meaning of Section 9(b) of the Administrative Procedure Act (A.P.A.). Such a license establishes rights and obligations having substantial, practical, and legal consequences. Not the least of which is the subjection of vital revenues and traffic of existing carriers, including those of appellants, to the new competitive service thereby brought into being. The serious nature of these consequences is not ameliorated by the so-called "temporary" nature of the new service. Where, as here, the recipient of temporary authority has on file with the Commission an identical application for permanent authority (Docket No. MC-66562 (Sub-No. 2282)) grants of temporary authority, although ostensibly made for a period of 180 days are, in fact, continued in effect by the Commission under the provisions of Section 9(b) of the A.P.A. until determination of the corresponding application for permanent authority. See, Title 49 C.F.R. § 2.1. Applications for permanent authority have been in litigation before the Commission for many years; and judicial review can add one or more additional years, the temporary authority remaining in effect all the while. The consequence then is to permit an unneeded new competitive service to come into effect, not for the limited period of 180 days

as provided by statute, but for a period of years during the course of which appellants can be innocently victimized.[6]

The District Court's upholding of the Commission's grant of temporary authority is particularly onerous in the circumstances of this case. Railway Express's application for permanent authority corresponding to the temporary authority was filed with the Commission on December 12, 1968. To date the Commission has refused to publish the application in the *Federal Register*, even though appellants by a letter to the Commission on August 16, 1968 (Appendix G) inquired about the status of the application so that they might file a formal protest and have the proceeding set down for hearing. There was no response from the Commission. Thus, Railway Express operates under temporary authority, the Commission sits on its application for permanent authority, and appellants are blocked at every turn.

The decision of the District Court in carving out, as it does, a special status for Railway Express when seeking temporary authority, and the conflict in such decision with that of the Washington District Court is certain to invite further litigation both before the Commission and in the federal courts. Furthermore, litigation will not be restricted to questions arising under Section 210a(a), but will involve Section 207 which, as noted above, comes into play because a grant of temporary authority and the filing of a corresponding permanent authority application per-

---

[6] In one proceeding involving Railway Express, Docket No. MC-66562 (Sub-Nos. 1943, 1945, and 1948), styled *Railway Express Agency, Incorporated, Extension—Charleroi*, Railway Express filed applications for permanent authority in March and April 1963 corresponding to temporary authority previously granted. An examiner's report and recommended order were served April 17, 1967, and he recommended that the application be denied, except with respect to shipments weighing less than 1,000 pounds. That proceeding is still pending on exceptions before the Commission, and Railway Express continues to operate under temporary authority.

mits operations under the temporary franchises until final determination of the permanent application. Numerous complex legal problems are presented, therefore, by the District Court's decision.

In *Alcoa S. S. Co.* v. *U.S.*, 338 U.S. 421, 423 (1949), this Court stated:

> We granted certiorari because determination of the issue raised here will guide adjustment of a large body of similar claims now pending.

In similar circumstances, certiorari was granted in *Ludecke* v. *Watkins*, 335 U.S. 160, 162 (1948), where it was stated by the Court (footnote 2, page 162):

> We are advised that there are 530 alien enemies ordered to depart from the United States, whose disposition awaits the outcome of this case.

The foregoing cases[7] quite clearly indicate that the reason for fully considering the matters presented was that final resolution by the Supreme Court of the questions involved would tend to eliminate further litigation in the lower courts. Appellants submit that the Supreme Court, by fully disposing of the questions here present, will effectively check a substantial part of the litigation now anticipated under Sections 210a(a) and 207.

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[7] We recognize that in the *Alcoa* and *Ludecke* cases the Court's certiorari jurisdiction was invoked. However, the judicial policy appears to be the same on matters coming before the Court on direct appeal as evidenced by the *Drum*, *American Trucking Associations*, and *Frozen Food* cases, *supra*.

CONCLUSION

For the reasons stated, appellants submit that the questions presented by this appeal are of substantial public importance and warrant plenary consideration by this Court upon briefs and oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Harry J. Jordan, an attorney for the appellants and a member of the Bar of the Supreme Court of the United States, certify that a copy of the Jurisdictional Statement has been served by first-class mail, postage prepaid, upon the following parties: Hon. Erwin Griswold, Solicitor General, Hon. Edwin M. Zimmerman, Assistant Attorney General, and John H. D. Wigger, Attorney, Department of Justice, Washington, D. C. 20530; C. V. Spratley, Jr., United States Attorney, Alexandria, Virginia; Robert W. Ginnane, General Counsel, and Raymond M. Zimmet, Attorney, Interstate Commerce Commission, Washington, D. C. 20423; John C. Ashton, Vice President and General Counsel, and William H. Marx, Assistant General Counsel, Railway Express Agency, Incorporated, 219 East 42nd Street, New York, New York 10017; H. Merrill Pasco, Esquire, Hunter, Williams, Gay, Powell & Gibson, 700 East Main Street, Richmond, Virginia 23212.

Dated at Washington, D. C., this 4th day of March, 1969.

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 4821-A

ESTES EXPRESS LINES, ET AL.,
Plaintiffs,

-v-

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants,

and

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Intervenor Defendant.

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(Argued October 3, 1968. Decided Nov. 13, 1968)

Before BUTZNER, Circuit Judge, and Lewis and Kellam, District Judges.

BUTZNER, Circuit Judge:

The plaintiffs, motor carriers, seek to annul orders of the Interstate Commerce Commission granting the Railway Express Agency, Inc., temporary authority to operate as a motor carrier over regular routes transporting general commodities in express service between Washington, D. C., and Richmond, Virginia, including several intermediate off-route points.[1] Finding the Commission did not abuse its discretion, we dismiss the complaint.

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[1] On December 7, 1967, the Commission, by its Temorpary Authorities Board, granted REA 120-day temporary authority. Railway Express Agency, Inc., New York, New York, Docket No. MC 66562 SUB 2262 TA. On January 30, 1968, the Commission, by Division 1 acting as an Appellate Division, denied petitions for reconsideration.

For many years, REA used the Richmond, Fredericksburg & Potomac Railroad for express shipments between Washington, D. C., and Richmond, Virginia. After receiving notice that the R.F. & P. would discontinue less than carload express shipments over this route, REA applied for "emergency" authority and "temporary" authority under § 210(a) of the Interstate Commerce Act [2] to continue its shipments by truck over highways that generally parallel the R. F. & P's tracks. The Commission *ex parte* allowed REA to operate under emergency authority. Later, the Commission granted REA temporary authority pending determination of its application for a permanent certificate.

In support of its application for emergency and temporary authority, REA filed an affidavit of one of its officers and statements from eleven shippers. In its statement REA alleged that it offers nationwide express service with air, motor, boat, and surface connections, and that the proposed route was a necessary link in this nationwide system. It proposed that inbound traffic arriving at Washington and Richmond throughout the day and night would be accumulated and then transported in the early morning hours in time for same day delivery. Outbound shipments would depart originating points in the afternoon, allowing prompt connection with through trains, trucks,

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[2] Section 210(a) of the Interstate Commerce Act [49 U.S.C. § 310(a)] provides in part:

> "(a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter."

and planes at Washington and Richmond. The statement further alleged that REA had no knowledge of any carrier in the territory which had nationwide surface, air, motor, and other connections providing co-ordinated express services.

The protesting carriers did not allege that they held themselves out to the public as providing the same co-ordinated, nationwide services for express as REA. They alleged that they move commodities similar to REA's, that they can handle express shipments between Washington and Richmond, and that they interline with other carriers. They recognize REA's dual capacity as a carrier and a "consumer" of carrier services, and they emphasize that by interlining with REA they can provide the same service that was previously available.

The carriers principally complain that the shippers' statements in support of REA's application lack the particularity required by Commission regulations. Title 49 C.F.R. § 1131.2(c) requires each supporting statement to contain detailed information on the shipper's needs, including answers to the following:

> "(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.
>
> "(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal."

In answer to these questions, each shipper said:

> "I am currently obtaining the service I need from REA Express, and, accordingly, have had no occasion to seek express service from anyone else. Within my knowledge, however, no service other than that of REA possesses all of the special characteristics required for adequate handling of my express shipments. If REA service became unavailable, I would

have an immediate and urgent need which no other carrier could meet."

We do not agree that the Commission erred in considering these statements. Inquiries (8) and (9) of the regulations were reasonably answered when the shippers explained why they had made no effort to obtain express service from existing carriers. The statements were sufficiently particular to alert the Commission to the continuing shipping needs of the merchants. Furthermore, the Commission could consider the statements along with REA's supporting statement and in the light of the failure of the carriers to allege facts showing that they were providing transportation comparable in all respects to REA's.

In *Acme Cartage Co.* v. *United States*, Civil No. 3677 (W.D. Wash., Oct. 4, 1968), the supporting shippers' omission, without good cause, of answers to questions (8) and (9) was held to be fatal. That case, however, is inapposite. There both the applicants and the protestants were engaged in motor freight transportation, and the protestants held themselves out to the public as providing service identical to that proposed by the applicants. Also, the court emphasized that the information sought by inquiries (8) and (9) did not appear elsewhere in the record. Here lack of comparable service is indicated by the shippers' statements, REA's statement, and, indeed, can be inferred from the protest itself.

Finally, we conclude that the plaintiff's contentions that the Commission violated congressional policy against unrestricted railroad entry into the motor carrier field and that its orders are not supported by substantial evidence are premature. Section 210(a) of the Act "conceives a summary disposition of the application." *Alabama Great Southern R. Co.* v. *United States*, 103 F. Supp. 223, 226 (E.D. Va. 1952). The fact that REA had handled 141,696 express items during the period from August 1966 to July 1967 on the R. F. & P., the precipitous discontinuance of

railroad facilities, the lack of comparable motor service, and the continuing requirements of the shippers show an immediate and urgent need for REA's express service. Resolution of other issues may properly await a decision on REA's application for permanent authority.

The Commission's exercise of its discretionary authority was not arbitrary or capricious. The complaint is dismissed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 4821-A

ESTES EXPRESS LINES, ET AL.,
Plaintiffs,

-v-

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants,

and

RAILWAY EXPRESS AGENCY, INCORPORATED,
Intervenor Defendant.

FINAL ORDER

For the reasons stated in the opinion of the court this day filed,

It is ADJUDGED and ORDERED that the complaint and this action are dismissed.

Let the clerk send copies of this order and of the opinion to counsel of record.

/s/ JOHN D. BUTZNER, JR.
United States Circuit Judge

/s/ OREN R. LEWIS
United States District Judge

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

A True Copy, Teste:
W. Farley Powers, Jr., Clerk

By /s/ Doris R. Casey
Deputy Clerk

November 13, 1968.

APPENDIX B

TA-GR-B

SERVICE DATE: DECEMBER 14, 1967
CORRECTED ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Temporary Authorities Board, held at its office in Washington, D. C., on the 7th day of December, A. D. 1967.

NO. MC 66562 SUB 2262 TA
RAILWAY EXPRESS AGENCY, INCORPORATED
NEW YORK, NEW YORK

The above-entitled application under Section 210a(a) of the Interstate Commerce Act being under consideration, and

It appearing, That there is an immediate and urgent need for the motor carrier service described in the appendix hereto, and that there is no carrier service available capable of meeting such need:

It is ordered, That applicant be, and is hereby, granted temporary authority, conditioned upon full compliance with all applicable, statutory and Commission requirements concerning tariff publications, evidence of security for the protection of the public, and designation of agents upon whom process may be served, to engage in the business of transportation by motor vehicle, in interstate or foreign commerce, to the extent and in the manner set forth in the appendix hereto, subject to the further conditions that unless otherwise provided in the appendix, (1) the service herein authorized shall be limited to the movement of traffic which originates at and is destined to the points and areas specified in the appendix, and (2) no operating right separately described in the appendix may be combined with any other operating right therein described or with any other temporary or permanent au-

thority now held by, or hereafter issued to, applicant or any other carrier.

It is further ordered, That the service provided for in this order shall not be commenced until all requirements have been met and applicant has received notice from the Commission that compliance has been effected and service may be instituted.

It is further ordered, That upon the authority herein granted becoming effective, failure of applicant to render reasonably continuous and adequate service to the public pursuant thereto and to maintain compliance with statutory and Commission requirements shall constitute sufficient grounds for suspension, change, or revocation of the said authority.

It is further ordered, That if applicant fails to comply with all applicable statutory and Commission requirements, rules, and regulations within 30 days from the date hereof, or such additional time as the Commission may specifically grant, this order shall be of no further force and effect and the said application shall be deemed to be denied for want of prosecution and applicant so notified.

And it is further ordered, That except as herein granted the said application be, and it is hereby, denied.

By the Commission, Temporary Authorities Board.

/s/ H. Neil Garson
H. Neil Garson,
Secretary.

(SEAL)

OP-TA-12
(1966)

APPENDIX

TA-GR-B

NO. MC 66562 SUB 2262 TA *

RAILWAY EXPRESS AGENCY, INCORPORATED
NEW YORK, NEW YORK

By the order of which this appendix is a part, entered under the name and number shown above, applicant upon compliance with the conditions set forth therein and after receipt of notice from the Commission that the said conditions have been met, and provided the operations are begun within the time allowed in said order or any extension thereof, is authorized to engage in the business of transportation by motor vehicle, in interstate or foreign commerce as follows:

Time for which authority is granted—120 days commencing no sooner than December 14, 1967.

Type of carrier—Common
Service authorized—

General commodities, moving in express service, over regular routes,

Between Richmond, Va. and Washington, D. C., over Interstate Highway 95, serving the intermediate and off-route points of Newington, Woodbridge, Quantico, Fredericksburg and Ashland, and Milford, Va.

The service authorized herein is construed as an extension and may be joined and combined with carrier's authorized operations, in NO. MC 66562 and SUB numbers thereunder, thereby negating the restrictions set forth in the first ordering paragraph.

The service to be performed by applicant shall be limited to that which is auxiliary to or supplemental of express service of the Railway Express Agency.

Shipments transported by applicant shall be limited to those moving on through bills of lading or express receipts.

* This order served December 14, 1967, is to change the route description in the order served December 12, 1967.

NOTICE TO PARTIES: Special Rules of Practice Governing Procedure of the Temporary Authorities Board provide that petitions for reconsideration of the action of the said Board may be filed within 20 days following service of notice of such action. The Commission requires the original and six copies of each such petition filed and also a statement certifying that one copy thereof has been served on each party of record in the proceeding.

APPENDIX C

ISSUANCE OF CERTIFICATE

SEC. 207. [*August 9, 1935.*] [*49 U.S.C. § 307.*] (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

TEMPORARY OPERATION OF MOTOR CARRIER PROPERTIES PENDING ACTION ON APPLICATION FOR CONSOLIDATION, MERGER, AND SO FORTH

SEC. 210a. [*June 29, 1938, amended September 18, 1940, March 27, 1942, June 29, 1946.*] [*49 U.S.C. § 310a.*] (a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract

carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

49 CFR 1131. *Temporary authority applications under section 210a(a) of the Interstate Commerce Act*

Section

1131.1 Controlling legislation and definitions
1131.2 Filing of applications.
1131.3 Processing of applications.
1131.4 Determination of applications.
1131.5 Rates, charges, and special permission applications.
1131.6 Petitions for reconsideration.

§ 1131.1 *Controlling legislation and definitions.*

(a) *Controlling legislation.*—Section 210a(a) of the Interstate Commerce Act, as amended, 49 U.S.C. 310a(a), which these rules and regulations are designed to implement, provides as follows:

> To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

Extensions of temporary authority beyond 180 days are governed by the special rules, contained in 49 CFR 2, promulgated pursuant to section 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b).

(b) *Definitions.*—As used in these rules, the following words and terms are construed as follows:

(1) "Temporary authority".—Limited-term motor carrier operating authority issued for periods up to 180 days (TA) pursuant to section 210a(a) of the Interstate Commerce Act to authorize transportation service for which there is an immediate and urgent need and which cannot be met by existing carrier service. This term includes "emergency temporary authority" issued for periods of 30 days or less (ETA) to meet an immediate and urgent need for service due to emergencies, in which time or circumstances do not reasonably permit the filing and processing of an application for temporary authority (TA).

(2) "Common carrier by motor vehicle".—Same as defined in section 203(a)(14) of the Interstate Commerce Act (49 U.S.C. 303(a)(14)).

(3) "Contract carrier by motor vehicle".—Same as defined in section 203(a)(15) of the Interstate Commerce Act (49 U.S.C. 303(a)(15)).

(4) "Aggregate of 180 days".—The total number of days of temporary authority which may be granted to a motor carrier under the provisions of section 210a(a) of the Interstate Commerce Act to meet a continuing need for a particular service.

(5) "Person".—Same as defined in section 203(a)(1) of the Interstate Commerce Act (49 U.S.C. 303(a)(1)).

§ 1131.2 *Filing of applications.*

(a) *General.*—All temporary authority applications are filed at and initially processed by the Commission's field offices. The field staff of the Commission's Bureau of

Motor Carriers conducts preliminary investigations into applications for temporary authority and transmits the applications, with recommendations as to their disposition, to the Commission's Temporary Authorities Board in Washington, D. C. The Bureau's field offices maintain records of authorized carriers and their operating authorities, and its staff members are available for consultation and to give assistance in the obtaining of motor carrier service, and guidance in the preparation of temporary authority applications and related supporting material, and in making rate, insurance, and other required filings. The field offices will furnish copies of necessary forms upon request.

(b) *How and where filed.*—A separate application for each temporary authority sought must be filed on Form BOR-95 (49 CFR 7.95). The signed original and six copies of each application and all supporting documents must be filed with the Bureau of Motor Carriers' field office which has jurisdiction over the point at which applicant is domiciled, or such other field office as the Commission may designate in special circumstances.

(c) *Supporting statements.*—Each application for temporary authority must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense must contain a certification of its accuracy and must be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. Any such supporting statement must contain at least the following information:

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grand of authority requested.)

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known.

(d) *Special procedures for filing applications for emergency temporary authority.*

(1) Emergency temporary authority should be applied for only where emergency conditions exist which do not permit sufficient time to afford the notice specified in § 1131.3(a). Applications for emergency temporary authority must be filed on Form BOR-95 (49 CFR 7.95).

(2) Where the emergency is found to continue beyond the period of the initial grant, the emergency temporary authority may be extended only upon written request until disposition is made of the longer term temporary authority application.

(3) In the case where the urgency of the situation warrants, the supporting statements of those having the immediate and urgent need for carrier service may be furnished by telegram. However, such telegram must contain substantially the factual information which is more fully described in paragraph (c) hereof. The telegram must be sent to the Bureau of Motor Carriers' field staff member who is handling the application.

(4) In processing emergency temporary authority applications, it often becomes necessary to use telephone and telegraph service to verify rate levels and the absence of existing carriers' service, and to submit the Bureau of Motor Carriers' field report to the Temporary Authorities Board in Washington, D. C. As Government funds are not available to pay such communications expenses, the applicant must have or make arrangements with the telephone and telegraph companies so that such costs can be charged to its account.

* * * *

§ 1131.3 *Processing of applications.*

(a) *Notice to interested persons.*

(1) *Service.*—Notice of the filing of temporary authority applications tendered shall be given by the publication

of a summary of the authority sought in the FEDERAL REGISTER, except that no such summary will be published in the case of emergency temporary authority applications. Such summaries will be prepared by the Bureau of Motor Carriers district supervisor and forwarded to the Bureau of Operating Rights, Washington, D. C.

(2) *Filing of protests.*—Any interested persons who can and will provide all or any part of the proposed service may file a protest against the application. Such protest must be specific as to the service which such protestant can and will offer and must consist of a signed original and six (6) copies which must be filed with the district suprevisor named in the FEDERAL REGISTER publication within 15 calendar days after the date notice of the filing of the application is published in the Federal Register. One copy of such protest must be served on the applicant or its authorized representative, if any, by U. S. mail or in person.

(b) *Publication of rates and charges.*—A carrier may not lawfully perform transportation under a grant of temporary authority unless and until compliance has been made with the rate and other requirements of section 217 of the Interstate Commerce Act in the case of common carriers and of section 218 of the act in the case of contract carriers, as provided in § 1131.5 hereof.

(c) *Revocation for noncompliance, and reinstatement and extension of time for making compliance.*—Temporary authority is approved subject to compliance within 30 days, or within such additional time as the Commission may approve, with the applicable provisions of the statute and the requirements, rules, and regulations prescribed by the Commission thereunder governing the filing of rate and contract publications; the filing of acceptable evidence of security for the protection of the public and designation of agents for service of process.

If compliance is not made within the 30-day period, or within the time allowed in any extension thereof appli-

cant will be notified that the temporary authority order is of no further force and effect. Where this occurs, applicant may make written request for reinstatement of the granting order if it so desires, provided (1) that such request is made within 20 days from the date of the notice, (2) that good cause can be shown as to why compliance was not made within the time allowed, and (3) that the request for reinstatement contains positive assurance that applicant is now able to and will comply immediately with all applicable requirements, if the order is reinstated.

§ 1131.4 *Determination of applications.*

(a) *General.*—Initial determination of temporary authority applications will be made by the Commission's Temporary Authorities Board or by Division 1 of the Commission, acting initially. But purposes of administration, distinctions in the applicable grounds of approval and rate filings will be maintained as between temporary authority of not more than 30 days (ETA), and temporary authority of up to 180 days (TA). No successive grants of temporary authority shall exceed a total of 180 days, and if grant of an emergency authority results in a total of aggregate temporary authority grants of more than 180 consecutive days, such total, to the extent that it exceeds 180 days, will be reduced accordingly.

While a grant of temporary authority is neither a permit nor a certificate under the Interstate Commerce Act it nevertheless enables the applicant to provide service either as a common or a contract carrier, as the case may be. Consequently, an applicant for temporary authority to operate as a motor contract carrier must show that the operation proposed is that of a contract carrier by motor vehicle as defined in section 203(a)(15) of the Interstate Commerce Act; that is, that the applicant serves one or a limited number of shippers, and that the service proposed involves either the assignment of vehicles to the supporting shipper's exclusive use or the provision of a

transportation service designed to meet the distinct needs of that shipper. No "dual operation" finding is necessary, however, where a grant of temporary authority to operate as a contract carrier is made to an existing common carrier and vice versa.

Since a grant of temporary authority is not a permit or certificate, none of the related rights, under the Interstate Commerce Act, such as the incidental charter rights of passenger carriers and the implied authority to perform terminal services at points within the commercial zone but beyond the corporate limits of named municipalities, is applicable. Temporary authority may not be tacked or joined with permanent authority held by the carrier for the purpose of performing through transportation, nor can through, joint-line service be performed thereunder. Where there is a need for such services which are not implicit in grants of temporary operating authority this fact should be stated specifically so that an appropriate authority description may be issued.

For administrative convenience, temporary authority to transport property will be considered to authorize the return transportation of shipper-owned trailers and of empty crates, barrels, bottles, hangers, pallets, bracing, dunnage, and other similar containers and shipping devices used in the outbound transportation covered by the temporary authority.

(b) *Standards for determination.*—The following standards shall be used by the Temporary Authorities Board, and by Division 1 of the Commission acting initially or in an appellate capacity, in the absence of special or unusual circumstances, in the determination under section 210a(a) of the Interstate Commerce Act (49 U.S.C. 310a (a)) of applications for temporary authority.

(1) *General.*—Grants of temporary authority shall only be made upon the establishment of an immediate and urgent need for the transportation of passengers, or

of particular commodities or classes of commodities, from specified origin points or areas to specified destination points or areas, having no carrier service capable of meeting such needs. Requests for temporary authority involving service to or from entire States, counties, or other defined areas will warrant approval only when supported by evidence that there is a compelling need for service to or from a representative number of points in each such State, county, or area, that there is a reasonable certainty that such service will be utilized, and that there is no carrier service available capable of meeting such need. Otherwise, such grants will be limited in accordance with the evidence to point-to-point authorizations covering the immediate and urgent need for service.

Any need which is the basis of an operation authorized by a temporary authority to be conducted for a period of less than an aggregate of 180 days is presumed not to be of a "continuing nature" unless the Commission otherwise expressly determines. If the need for a particular service ceases and a temporary authority covering such need expires or is revoked, and a new or separate need arises subsequent to such expiration or revocation, additional temporary authority for the 180-day aggregate, or for a shorter period, may be granted to the same carrier for the service, notwithstanding the prior grant or grants. However, an application filed after an aggregate of 180 days temporary authority has expired or been revoked will be denied unless the facts clearly show that the application is in reality based on a new need and not a continuation of the need on which the prior grant of authority was based.

(2) *Immediate and urgent need.*—An immediate and urgent need justifying a grant of temporary authority will be determined to exist only where it is established that there is or soon will be an immediate transportation need which reasonably cannot be met by existing carrier service. Such a showing may involve a new or relocated

plant, different method of distribution, new or unusual commodities, an origin or destination not presently served by carriers, a discontinuance of existing service, failure of existing carriers to provide service, or comparable situations which require new motor carrier service before an application for permanent authority can be filed and processed.

(3) *Emergency temporary authority.*—An immediate and urgent need justifying a grant of emergency temporary authority will be determined to exist only where it is established that existing carrier service is not capable of providing transportation service to meet immediate and actual emergencies, such as, for example, to prevent a plant shutdown, to move particular shipments in the interest of the national defense, to meet needs resulting from fires, floods, storms, or other disasters which affect the public health, safety, and welfare, disruption in existing carrier services by work stoppages, unexpected cessation of existing transportation service, lack of equipment capable of transporting the involved commodity, failure or lack of storage facilities and imminent spoilage of perishable commodities, or comparable situations which make it impracticable to afford the notice specified in §1131.3(a).

(4) *Single-line service.*—Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority. A grant of temporary authority to effecuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable of, or have failed in, meeting the reasonable immediate and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved.

(5) *Complete service.*—Requests for temporary authority on the basis of "providing a complete service to a

shipper," even though existing carriers are participating in the traffic and in many instances can provide a substantial part of the service, require special justification. Generally, in such instances, the applicant must establish with reasonable certainty that the existing carriers cannot adequately serve the shipper in their authorized territories, or that the supporting shipper has revised its distribution methods to such an extent that there actually is an immediate and urgent need for the complete service proposed.

(6) *Failure to provide equipment.*—Temporary authority may be granted where existing authorized carriers are unable or refuse to furnish equipment necessary to move passengers or the traffic of shippers in order to meet an immediate and urgent transportation need.

(7) *Alternate routes.*—Except in unusual circumstances, temporary authority to operate over an alternate route will not be granted, even though the service route may be circuitous, since the carrier-applicant may now operate between the points involved.

(8) *General bases for disapproval.*—Applications for temporary authority may be denied for the following reasons:

(i) Failure to meet statutory standards.

(ii) Unfitness of the applicant.

* * * * *

§ 1131.6 *Petitions.*

(a) *Petitions for reconsideration.*—Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions for reconsideration of orders of (1) the Temporary Authorities Board, and (2) Division 1 initially granting or denying temporary authority in proceedings not subject to prior determination by the Temporary Authorities Board, may be filed by any interested person.

(b) *Replies.*—Replies may be filed by any interested person to such petitions; but if the facts stated in any such petition disclose a need for accelerated action, such action, in the discretion of the Commission, may be taken before expiration of the time allowed for reply. Replies received after accelerated action on petition will be treated as petitions for reconsideration of the accelerated action and given corresponding accelerated action.

(c) *Petitions for reconsideration.*—The filing of a petition for reconsideration of an order of Division 1 or the Temporary Authorities Board does not have the effect of automatically staying such order, and the grantee carrier may conduct the operations authorized by such order upon compliance with its tariff, insurance, and other requirements for the duration of the temporary authority, or until otherwise ordered.

It is further ordered, That this order shall become effective on July 1, 1965, and shall remain in effect until modified or revoked, in whole or in part, by further order by the Commission;

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy thereof in the Office of the Secretary of the Interstate Commerce Commission, Washington, D. C., and by filing a copy with the Director, Office of the Federal Register.

[52 Stat. 1237, 49 U.S.C. 304(a)6; 52 Stat. 1238, 49 U.S.C. 310a(a); 49 Stat. 560, 49 U.S.C. 317; 49 Stat. 561, 49 U.S.C. 318; 60 Stat. 237, 5 U.S.C. 1003 and 1008.]

By the Commission.

APPENDIX D

SERVICE DATE: FEBRUARY 1, 1968 ORDER D-370

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, acting as an Appellate Division, held at its office in Washington, D. C., on the 30th day of January, 1968.

NO. MC 66562 SUB 2262 TA

RAILWAY EXPRESS AGENCY, INCORPORATED
NEW YORK, NEW YORK

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Joint petition of Estes Express Lines, et al., and petition of Hemingway Transport, Inc., protestants, filed December 27, 1967, and January 2, 1968, respectively, for reconsideration of the order of the Commission, Temporary Authorities Board, dated December 7, 1967, granting temporary authority herein;

(2) Reply by applicant filed January 15, 1968;

and good cause appearing therefor:

It is ordered, That said petitions be, and they are hereby, denied for the reason that no showing has been made which would warrant a conclusion different from that reflected by the said order of December 7, 1967.

By the Commission, Division 1, acting as an Appellate Division.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

Civil Action No. 3677

ACME CARTAGE CO.; ASBURY TRANSPORTATION CO.; BEST WAY MOTOR FREIGHT, INC.; BLACK BALL FREIGHT SERVICE; EDMONDS-ALDERWOOD AUTO FREIGHT COMPANY; GARRETT FREIGHT-LINES, INC.; HOGLAND TRANSFER COMPANY; INLAND TRANSPORTATION CO., INC.; INTER-CITY AUTO FREIGHT, INC.; JAMES J. WILLIAMS, INC.; LOS ANGELES-SEATTLE MOTOR EXPRESS, INC.; NATIONAL TRANSFER, INC.; GUS VANDERPOL and HENRY VANDERPOL, DOING BUSINESS AS OAK HARBOR FREIGHT LINES; OREGON-NEVADA-CALIFORNIA FAST FREIGHT, INC.; PENINSULA TRUCK LINES, INC.: RALPH POZZI, CARL A. POZZI, CLINTON D. POZZI and WAYNE POZZI, DOING BUSINESS AS POZZI BROS. TRANSPORTATION COMPANY; RENTON-ISSAQUAH AUTO FREIGHT, INC.; SILVER EAGLE COMPANY; TACOMA MOVING & STORAGE CO.; VALLEY MOTOR LINES, INC.; WALLACE-COLVILLE MOTOR FREIGHT, INC.; UNITED-BUCKINGHAM FREIGHT LINES, PLAINTIFFS,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

D. W. RAMSEY MOTOR FREIGHT, INC.; FEDERAL TRANSFER CO., INC.; SNIDER TRUCKING SERVICE, INC.; and WESTERN CARTAGE, INC., INTERVENORS

OPINION

Before HAMLEY, Circuit Judge, and BODLT and GOODWIN, District Judges.

BOLDT, District Judge:

Plaintiff motor freight carriers operating in the State of Washington brought this action to set aside an annul orders of the Temporary Authorities Board of the Interstate Commerce Commission (hereafter ICC), granting temporary authorities under Section 210a(a) ICC Act, 49 U.S.C. 310a(a), to seven non-certified motor freight carriers operating within the State of Washington.[1] "Grandfather" certificates of registration granted to the seven carriers by ICC were held invalid in *Blackball Freight Service* v. *United States*, 266 F. Supp. 287 (WD Wash SD, 1967). Pursuant to that decision, ICC cancelled the certificates. Thereafter the seven carriers filed applications for temporary authority to continue the service previously provided under the cancelled certificates. Notice of the temporary authority applications appeared in the Federal Register and protests were duly filed by plaintiffs. The ICC Board found there was urgent and immediate need for the services for which authority was sought by the applicants and temporary authority to provide the service was granted by orders dated between July 20, 1967 and October 16, 1967.

As authorized by the ICC Act, after extended consideration the ICC adopted Temporary Authority Rules, effective July 5, 1965, specifying procedures for the submission and determination of temporary authority applications under

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[1] Interstate Commerce Act, Section 210a(a), as amended, 49 U.S.C. 310a(a), provides:

> "To enable the provision of service for which there is an *immediate and urgent need* to a point or points within a territory having *no carrier service capable of meeting such need*, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter." (Emphasis added).

Section 210a(a) ICC Act. Ex Parte No. MC-67, 49 CFR 1131. The rules specifically provide in mandatory terms that each filed temporary authority application must be accompanied by one or more supporting statements and each such statement must contain at least the information specified in eleven categories.[2] Two of those are:

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[2] Ex Parte No. MC-67, 49 CFR 420.2, 49 CFR 1131.2, provides:

"(b) How and Where filed. A separate application for each temporary authority sought must be filed on Form BOR-95 (§ 1003.1 of this chapter). The signed original and six copies of each application and all supporting documents *must be* filed with the Bureau of Operations Field Office which has jurisdiction over the point at which applicant is domiciled, or such other field office as the Commission may designate in special circumstances.

"(c) Supporting Statements. *Each application for temporary authority must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers,* except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense, must contain a certification of its accuracy and must be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. *Any such supporting statement must contain at least the following information:*

(1) Description of the specific commodity or commodities to be transported. (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested.)

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

[Footnote continued on page 45]

"(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

"(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal."

Plaintiffs assert that not a single one of the supporting letters accompanying the temporary authority applications of the seven carrier applicants provided the information required by either of the two above quoted rule provisions. Plaintiffs contend that granting of the temporary authorities in question without a showing of the required information was arbitrary, capricious and erroneous in law. At argument, counsel for defendants conceded that the required information was not contained in any of the supporting letters. Intervenors (four of the seven applicants) contended otherwise and, with leave, after argument filed a memorandum in support of their contention which the court has fully considered. The defendants and Intervenors contend the Temporary Authority Rules are merely "guidelines" for ICC action and not to be construed as

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[2] [Continued]

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made no obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known." (Emphasis added.)

limiting the broad discretion of ICC in granting temporary authorities pursuant to Section 210a(a) of the ICC Act. Also, they urge that any failure of the ICC to enforce its rules in the particulars above referred to does not show the action taken upon the temporary authorities in question was arbitrary, capricious or unlawful.

Contrary to the suggestion of defendants and Intervenors, we find and hold it unmistakably clear that neither the term "carrier service" in Section 210.2(a) of the ICC Act nor the term "existing carrier", as used in § (8) and § (9) of 1131.2(c) above quoted, refers to services by applicants for temporary authority to provide the needed services in question. Therefore, the requirement of information pertaining to "existing carriers" in the above quoted regulations is not satisfied by supporting statements concerning service by the applicant "grandfather" carriers.

From our examination of the supporting letters attached to each of the applications in question, we find none of them approaches compliance with, or provides the information required by, either § (8) and § (9) above quoted. We do not find the information specified in those sub-sections otherwise shown or referred to of record in the present case.

Under sub-section 1131.3(a)(2) of the Temporary Authority Rules, any interested carrier who can and will provide all or any part of the proposed service for which temporary authority is sought may protest against temporary authority applications to provide such service.[3] Any such protest must state the specific service the protestant can and will offer to shippers needing the service. There is no indication ICC questioned the sufficiency of plaintiffs' protests and they are not challenged in this case.

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[3] "1131.3(a)(2) Filing of Protests. Any interested persons who can and will provide all or any part of the proposed service may file a protest against the application. Such protest must be specific as to the service which such protestant can and will offer . . ."

If any shipper, whether or not it submitted a letter in support of any temporary authority application in question, made reasonable inquiry as to the identity of carriers certified to provide the needed service within the territory in question, or specifically requested any plaintiff carrier to provide the needed service at any time and particularly during the period between the cancellation of the licenses of applicants and the filing of their applications for the temporary authorities in question, there is no evidence or indication thereof in the record before this court. At most, the supporting letters state a preference of the letter writers for continuance of service by the applicants. It is clear to us the mere preference of shippers to use non-certified carriers for needed service does not indicate and certainly does not establish that carriers certified by ICC to operate within the territory in question are not capable of providing the needed service.

By its terms, 49 U.S.C. 310a(a) vests discretion in ICC to grant temporary authority for motor carrier services only when both of the two conditions specified in the statute are shown, i.e. (1) "an immediate and urgent need for service" (2) "within a territory having no carrier service capable of meeting such need." When both conditions exist, the statute provides for wide latitude in the exercise of the discretion ICC may exercise in granting temporary authority applications. However, before ICC can exercise that discretion it is clear from the language of the statute that concurrent existence of both conditions (1) and (2) is mandatory and absent either one of the conditions ICC has neither power nor discretion to grant temporary authority applications.

As recited in the Temporary Authority Rules, they are "designed to implement the statute." Nothing in the Rules is more basic or important to that purpose than the provisions designed to aid in fair and sound determination of the statutory conditions mandatorily required for the exercise of either power or discretion by the ICC in

granting temporary authority.[4] Obviously, the information required by § (8) and § (9) bears directly and specifically on one of those two conditions, i.e. whether the urgently needed service can and will be provided by existing certified carriers. Enforcement of reasonable compliance with these particular provisions appears desirable in

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[4] The essential purposes of the rules and the vital importance of compliance with the very rule provisions involved in this case has been recognized by ICC itself. The following ICC policy release was issued January 23, 1968:

"POLICY CLARIFIED FOR ICC ACTION ON APPLICATIONS FOR TEMPORARY AUTHORITY TO CONDUCT MOTOR CARRIER OPERATIONS.

"Requests for temporary authority to conduct regulated motor carrier service will be turned down if the applications do not adequately comply with Interstate Commerce Commission rules.

"The clarified policy will be administered by Division 1, which handles operating rights matters.

"The Commission adopted this policy upon receiving recommendation from the Division because of the haphazard preparation of many of the more than 5,000 applications for temporary authority received annually. Most of the requests involve common carrier trucking. The applications usually result from an emergency or short term need of shippers, or when new products and commodities are developed and require immediate transportation services.

"*Because of 'slip-shod' preparation of many of the applications, the Division frequently has found it difficult to reach an informed and equitable decision.* Further investigation by the ICC staff often has been required in order to obtain necessary information. *Foremost among the complaints in this area are those concerning failure of the applicant or his representative to submit supporting statements which contain all of the information required by Section 240.2(c) of the Temporary Authori- Rules.* These rules are set forth in Ex Parte No. MC-67, Motor Carrier Temporary Authorities; 98 M.C.C. 483, and 49 CFR 1131 (formerly 49 CFR 340).

"According to the clarified policy, Division 1 will deny temporary authority applications in which, because of non-compliance with the rules, a fair adjudication is not possible on the record before the Commission, without prejudice, however, to the filing of a new application conforming to the rules." (Emphasis added)

regular practice but their enforcement is essential when, as in this case, several certified protestants have asserted ability and willingness to provide the needed carrier service in question and evidence to the contrary is not shown of record. Variable and unpredictable enforcement of important and mandatorily stated rule provisions is inequitable in principle and unsound in practice. If particular rules prove over rigid or otherwise unsatisfactory in practice they can be amended as experience dictates. *Service* v. *Dulles*, 354 U.S. 363 (1957); *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407 (1942).

Having adopted Rules emphatically requiring temporary authority applicants to provide the essential information specified in § (8) and § (9), we find it capricious and arbitrary for ICC, without good cause shown, to ignore or waive compliance with these critically important rule provisions. At a minimum, we find it so when the essential information § (8) and § (9) require to be provided does not appear elsewhere in the record.

For the reasons stated, it appears as a matter of law that the temporary authorities in question were erroneously granted and that each of them should be and hereby is held null and void.

IT IS SO ORDERED.

DATED this 4th day of October, 1968.

/s/ FREDERICK G. HAMLEY
FREDERICK G. HAMLEY
United States Court of
Appeals Judge

/s/ GEORGE H. BOLDT
GEORGE H. BOLDT
United States District Court
Judge

/s/ WILLIAM N. GOODWIN
WILLIAM N. GOODWIN
United States District Court
Judge

APPENDIX F

INTERSTATE COMMERCE COMMISSION
Washington, D. C. 20423

737-9765 Ext. 350

15-68

FOR RELEASE:

Tuesday, January 23, 1968
9:30 a.m.

POLICY CLARIFIED FOR ICC ACTION ON APPLICATIONS FOR TEMPORARY AUTHORITY TO CONDUCT MOTOR CARRIER OPERATIONS

Requests for temporary authority to conduct regulated motor carrier service will be turned down if the applications do not adequately comply with Interstate Commerce Commission rules.

The clarified policy will be administered by Division 1, which handles operating rights matters.

The Commission adopted this policy upon receiving recommendation from the division because of the haphazard preparation of many of the more than 5,000 applications for temporary authority received annually. Most of the requests involve common carrier trucking. The applications usually result from an emergency or short term need of shippers or when new products and commodities are developed and require immediate transportation services.

Because of "slip shod" preparation of many of the applications, the division frequently has found it difficult to reach an informed and equitable decision. Further investigation by the ICC staff often has been required in order to obtain necessary information. Foremost among the complaints in this area are those concerning failure of the applicant or his representative to submit supporting

statements which contain all of the information required by Section 240.2(c) of the Temporary Authority Rules. These rules are set forth in Ex Parte No. MC-67, *Motor Carrier Temporary Authorities*, 98 M.C.C. 483, and 49 C.F.R. 1131 (formerly 49 C.F.R. 340).

According to the clarified policy, Division 1 will deny temporary authority applications in which, because of non-compliance with the rules, a fair adjudication is not possible on the record before the Commission, without prejudice, however, to the filing of a new application conforming to the rules.

APPENDIX G

August 16, 1968

The Honorable H. Neil Garson
Secretary
Interstate Commerce Commission
Washington, D.C. 20423

Re: Docket No. MC-66562 (Sub-No. 2282), Railway Express Agency, Incorporated

Dear Mr. Garson:

Our firm represents a number of motor carriers which are seeking to have enjoined and annulled a grant of temporary authority to Railway Express in Docket No. MC-66562 (Sub-No. 2262 TA). A court proceeding for this purpose has been instituted in the United States District Court for the Eastern District of Virginia, *Estes Express Lines, et al.* v. *United States of America, et al.*, Civil Action No. 4821-A.

I have been advised that on December 12, 1968, Railway Express filed an application for corresponding permanent authority. According to the Commission's files and telephone conversations with the office of Mrs. Virginia K. Coulter, Certificates and Captions, the application has not been published in the *Federal Register*. Our clients desire to protest the application for permanent authority and to ask for oral hearing for the purpose of showing that no public need exists for the proposed service. However, since the application has not been published in the Federal Register, they are unable to file a protest and must continue to scan the *Federal Register* in the expectation that the application will be published. This causes much inconvenience and apprehension on the part of our clients that the application may for some reason escape notice. In addition, the failure of the Commission to publish this application in the *Federal Register*

places our clients in the position of having competition from Railway Express under temporary authority, which, by operation of law, continues in effect until the disposition of the permanent application.

We would appreciate it, therefore, if the Commission would advise us when the Railway Express application for permanent authority will be published in the *Federal Register* and when, if oral hearing is requested and granted, this matter can be reasonably expected to be heard.

Very truly yours,

HARRY J. JORDAN

HJJ:tmh

cc: Mr. William H. Marx
Counsel for Railway
Express Agency